



not “indicative of the type of belligerent and uncompromising approach that [Rule 37] is designed to prevent.” *Id.*

When the court denies a party’s motion to compel, the court must determine whether sanctions are appropriate. With regard to motions to compel discovery, Federal Rule of Civil Procedure 37(a) provides:

If the motion is denied, **the court . . . must**, after giving an opportunity to be heard, **require the movant**, the attorney filing the motion, or both **to pay the party . . . who opposed the motion its reasonable expenses** incurred in opposing the motion, including attorney’s fees. But the court must not order this payment if the motion was substantially justified or other circumstances make an award of expenses unjust.

Fed. R. Civ. P. 37(a)(5)(B) (emphasis added).

The court finds expense-shifting sanctions are appropriate under the circumstances. The defendants’ filing of the motion to compel and failure to reasonably confer with opposing counsel required the plaintiff to file a brief and evidence to oppose the motion. Further, the defendants’ conduct in failing to file a reply addressing the issues raised by the plaintiff or failing to withdraw the motion required the court to spend judicial resources on the matter. To make the matter worse, the defendants’ counsel admits he did not “investigate” whether his office had received the supplemental discovery responses when the plaintiff filed the response to the motion to compel. It was not until the court entered the show cause order that the defendants attempted to resolve the intra office “miscommunication.” The local and federal rules are in place to prevent the very type of conduct engaged in by the defendants’ counsel. Specifically, the defendants’ counsel filed an unsupported motion without conferring with opposing counsel enough to realize he had received supplemental discovery responses more than one month earlier. The court need not determine whether counsel’s conduct was “belligerent or uncompromising.” Rule 37 does not require the court to determine whether the movant’s conduct was willful. However, this waste of resources should not be borne by the plaintiff who acted reasonably and responsibly when confronted with the motion to compel. Under these circumstances, the court finds the defendants have failed to show substantial justification for filing the motion or other circumstances which make an expense award unjust. Accordingly, the

court will grant the plaintiff reasonable expenses for filing her opposition to the motion to compel. Upon consideration,

**IT IS ORDERED:**

1. The plaintiff is awarded reasonable costs and attorney's fees in responding to the defendants' Motion to Compel ([Filing No. 30](#)).

2. Counsel for the parties shall confer on a reasonable amount to be awarded and, if there is agreement, shall file **on or before March 25, 2011**, a stipulation of the costs and fees to be awarded. In the event the parties fail to reach an agreement, the plaintiff may file **on or before March 29, 2011**, an application for the award of the costs and fees accompanied by an affidavit of such costs and fees, pursuant to [NECivR 54.3](#) and [54.4](#). The defendants shall have **until on or before April 5, 2011**, to respond to the plaintiff's application. Thereafter, the issue of costs and sanctions will be deemed submitted and a written order entered.

3. The plaintiff's objection ([Filing No. 44](#)) is sustained. The court did not consider the portion of the defendants' response to which the plaintiff objected when determining whether to assess sanctions.

DATED this 8th day of March, 2011.

BY THE COURT:

s/Thomas D. Thalken  
United States Magistrate Judge

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